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IN THE

Supreme Court of the United States

October Term, 1966

No. 1061

WILLIAM McADOO, *et al.*,

Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, FIRST DEPARTMENT

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v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, FIRST DEPARTMENT

To the Justices of the Supreme Court of the United States:

Petitioners William McAdoo, *et al.*, pray that writs of certiorari issue to review the judgment of the Appellate Term of the Supreme Court of the State of New York, County of New York, First Department, entered on the 9th day of June, 1966, affirming the judgments of conviction of the Criminal Court of the City of New York, County of New York, dated the 5th day of April, 1965.

Opinions Below

The opinion of the said Criminal Court of the City of New York is reported at 45 Misc. 2d 664; 257 N. Y. Supp. 2d 763. It is incorporated herein as Appendix A.

The unreported opinion on a pre-trial motion to dismiss the informations is incorporated herein as Appendix B.

The aforesaid Appellate Term affirmed without opinion. It is reported at 51 Misc. 2d 263; 272 N. Y. Supp. 2d 412.

Jurisdiction

(a) The certificate of the Court of Appeals of the State of New York, dated September 16, 1966, denying leave to appeal was made by Chief Judge Stanley H. Fuld and is incorporated herein as Appendix C.

(b) The order of Judge Stanley H. Fuld of the Court of Appeals of the State of New York, granting a stay of judgment pending the hearing and determination of the merits of a petition for certiorari by the Supreme Court of the United States was made September 16, 1966, and is incorporated herein as Appendix D.

(c) An order dated December 9, 1966, extending time to file a petition for a writ of certiorari to and including February 13, 1967, was made by Associate Justice John M. Harlan, and is incorporated herein as Appendix E.

(d) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

Questions Presented

1. Whether petitioners were denied due process of law by failure and refusal of the prosecuting attorney to advise them of the purpose of the grand jury investigation and the materiality of the questions asked?

This question was first raised on pre-trial motions to dismiss the informations (* 48, 52, 59, 62, 63, 81, 113, 126, 127). The court determined that in view of the questions asked the petitioners could not be in ignorance of the purpose of the inquiry (Appendix B). It was again raised at the trial on a motion to dismiss the informations and for an acquittal of petitioners (290-314, 331, 338, 339, 461, 594, 595, 732, 733, 741-748). The trial court held that there was no requirement that the witness be so advised. It also held that this court's decisions in *Watkins* v. *U. S.*, 354 U. S. 178; *Deutch* v. *U. S.*, 367 U. S. 456; and *Russell* v. *U. S.*, 369 U. S. 749, were inapplicable to a grand jury investigation (Appendix A).

This point was raised on appeal to the said appellate court and is embodied in the certificate of Chief Judge Stanley H. Fuld, denying leave to appeal (Appendix C).

2. Whether the petitioners before a grand jury could receive complete immunity from prosecution in the absence of strict compliance by the prosecutor and grand jury with the procedural requirements set forth in Section 2447 of the Penal Law of the State of New York?

This question was first raised on pre-trial motions to dismiss the informations (48, 51, 52, 59, 62, 69, 72, 79-81,

* References are to pages in Record.

88, 111-113). The court determined that complete immunity was granted in accordance with Section 2447 of the Penal Law (Appendix B). It was again raised at the trial on a motion to dismiss the informations and for an acquittal of all petitioners (209-211, 272, 323, 350, 370, 611, 612, 715-718, 736-738). The trial court held that procedural requirements set forth in Section 2447 of the Penal Law were according to the evidence fully adhered to (Appendix A).

This point was raised on appeal to the said Appellate Court and is embodied in the Certificate of Chief Judge Stanley H. Fuld, denying leave to appeal (Appendix C).

3. Whether in an area preempted by the Federal Government a state grand jury can grant immunity from federal prosecution?

This question was first raised at the trial on a motion to dismiss the informations and for an acquittal of all petitioners (80, 81, 112, 693-700). The trial court did not discuss the pre-emption question merely holding that the Federal Government is precluded from using testimony before a grand jury or its fruits in any criminal prosecution of the witness citing *U. S.* v. *Interborough Delicatessen Dealers Ass'n*, 235 F. Supp. 230.

This point was raised on appeal to the said Appellate Court and is embodied in the Certificate of Chief Judge Stanley H. Fuld, denying leave to appeal (Appendix C).

4. Whether petitioners were fully and fairly advised of their rights before the grand jury?

This question was first raised on pre-trial motions to dismiss the informations (53, 59, 64, 69, 74, 81, 82). It was raised at the trial on motion to dismiss the informations and for acquittal (276, 738, 739). With respect to petitioner Crenovich, the question was first raised on appeal in the Appellate Term.

5. Whether the petitioners were denied due process and the equal protection of the laws as a result of this prosecution under Section 600(6) of the Penal Law of the State of New York being brought on informations rather than indictments thereby depriving petitioners of their right to a jury trial where they faced a maximum sentence of one year imprisonment?

This question was first raised on pre-trial motions to dismiss the informations (49, 52, 60, 62, 70, 72, 82, 113, 114). The court determined that the prosecutions could be initiated by informations (Appendix B). It was again raised at the trial on motion to dismiss the informations and for acquittal of all petitioners (314-321, 461, 462, 593, 594). The trial court held that an information charging contempt as a misdemeanor was authorized (Appendix A). This point was raised on appeal in the Appellate Term and is embodied in the Certificate of Chief Judge Stanley H. Fuld, denying leave to appeal (Appendix C).

6. Whether the prosecutor could, consistent with due process of law, multiply contempts by repeated questioning on the same subject of inquiry where petitioners had already refused to answer?[1]

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[1] Applicable to petitioners McAdoo, Anderson and Douglas only.

This question was first raised on pre-trial motions to dismiss the informations (60, 64, 69, 74, 84, 99, 100). It was again raised at the trial on motions to dismiss the informations and for acquittal (595-599). It was again raised on appeal to the Appellate Term.

Statement of the Case

Informations were filed against petitioners on October 21, 1964, charging them with multiple counts of criminal contempt and in one case a count of perjury in the second degree (16-20).[2]

They were arraigned on October 27, 1964, and pleaded not guilty to the charges contained in the respective informations.

On January 19, 1965, Judge Arthur Braun decided the pre-trial motions to dismiss the said informations (Appendix B).

They were tried before a three judge bench in the said Criminal Court of the City of New York and found guilty on the 22nd day of March, 1965 (45 Misc. 2d 664; 257 N. Y. Supp. 2d 763), and sentenced on the 5th day of April, 1965 to serve four months in the workhouse.

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[2] *McAdoo* was charged with four contempt counts; the first was dismissed after trial. *Anderson* was charged with four contempt counts; the first was dismissed on a pre-trial motion. *Douglas* was charged with four contempt counts; the second and fourth were dismissed on a pre-trial motion. *Crenovich* was charged with four contempt counts and one perjury count; the second and fourth and prejury counts were dismissed on a pre-trial motion. *Barnett* was charged with one contempt count.

Appeals were taken to the said Appellate Term of the Supreme Court of the State of New York. The convictions and sentences were affirmed without opinion on the 9th day of June, 1966 (51 Misc. 2d 263; 272 N. Y. Supp. 2d 412).

Reasons for Granting the Writ

1. Petitioners were denied due process by the failure and refusal of the prosecuting attorney to advise them of the purpose of the grand jury investigation and the materiality of the questions.

The petitioners appeared before the grand jury on several days in 1964 under subpoena.[3] Only petitioner Douglas was given an explanation of the purpose of the investigation. The statement of the prosecutor to Douglas before the grand jury is as follows (501):

> Mr. Douglas, this grand jury has conducted an investigation to * * * in the past month to determine whether the Progressive Labor Movement and its membership have conspired to commit the crimes of incitement to riot and conspiracy to commit criminal anarchy.

The petitioners, except as indicated with respect to Douglas, not having been apprised of the purpose of the hearing had no way of determining the materiality and purpose of the questions. They were not afforded the opportunity to have a court pass upon the legality and

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[3] *McAdoo*, September 14, 23 and 30; *Anderson*, August 31, September 23 and 30; *Douglas*, August 31, September 1, 14 and 30; *Crenovich*, September 14 and 23; *Barnett*, September 23.

propriety of the questions and a direction and order to answer same.

The failure of the prosecutor to either inform the petitioners of the purpose of the investigation or the materialty of the questions to the investigation then being conducted by the grand jury, or, to obtain a direction and order from the court that petitioners respond to the questions, are fatal defects.

Under Section 600(6) the conduct of the witness must be both "contumacious and unlawful" refusal to answer any "legal and proper interrogatory" to constitute a contempt.

32 Cyc. (p. 627) defines "proper" as "appropriate, or suitable in all respects; consistent with propriety; appropriate or suited to." The definitions given by both Webster and Bouvier are substantially the same. Read in its context "proper" is used as a synonym of "legal" or "material".

In *Matter of Grand Jury* (*Cioffi*), 10 App. Div. 2d 425 (N. Y.) the court had before it a prosecution for contempt before a grand jury under Section 750(5) of the Judiciary Law of the State of New York.[4] The court found that "materiality or relevancy" is a necessary element on questions before a grand jury and that a witness may be punished for contempt only if it appears that the evidence sought of him was material and relevant.

A witness cannot be contumacious in his refusal to answer a question unless he were made aware of the pur-

[4] The language is identical to Section 600(6) of the Penal Law of the State of New York under which petitioners were prosecuted.

pose of the inquiry in order that a proper determination can be made of the validity of the questions. Even more important is whether the court can conclude that the witness acted contumaciously or willfully when it cannot determine the purpose of the investigation, at least not at the time the questions are asked and only when the entire grand jury record is read.

In *Cioffi, supra,* 426, the court prefaced its opinion with these words:

> When subpoened and sworn before the Grand Jury, the appellants were advised of the purpose and scope of the investigation.

The witnesses in *Cioffi, supra,* were advised as to the nature and purpose of the Grand Jury's investigation and the nature of the inquiries.

The protection of a witness before a grand jury from a denial of due process was also clearly enunciated in *People* v. *De Feo,* 308 N. Y. 595. There the Court held:

> According to the Grand Jury minutes it does not appear that at or prior to the three sessions held before December 4, the attention of the witness was in any way called to the purpose of the inquiry * * *
> Nonetheless, as we have pointed out, at the first three sessions the witness was not informed of the purpose of the inquiry * * *

The knowledge by the witness of the purpose of the investigation in order that he and this Court may determine whether the questions are "proper and legal" and material is basic to an action to punish for criminal contempt.

"That knowledge must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense" (*Watkins* v. *U. S.*, 354 U. S. 178, 209).

"Punishment for a criminal contempt is a drastic remedy for willful wrong." (*Matter of Spector* v. *Allen*, 281 N .Y. 251, 260).

In *Price* v. *U. S.*, 369 U. S. 749, 767, 768, this Court was very much concerned with this question, i.e., whether the witness was fully apprised of the subject of the inquiry. It was not enough that the witness "may or may not have been familiar" with the prior record. The important point in that case and the case now before this Court is that *Price, supra,* and petitioners herein were not told what the investigation was about.

The failure of the prosecutor to bring home to a witness the subject matter of the inquiry, whether before a Congressional Committee, *Deutch* v. *U. S.*, 367 U. S. 456, or a grand jury as in this case, violates the requirements of the Due Process Clause of the Fifth Amendment.

2. Petitioners did not receive complete immunity from prosecution because the procedural requirements under Section 2447 of the Penal Law of the State of New York were not afforded them by the prosecutor and grand jury.

A witness before a grand jury does not receive automatic immunity. It can only be conferred by statute with certain procedural safeguards that must be afforded the witness.

The court in *People* v. *Laino*, 10 N. Y. 2d 161, 173 held that:

> Complete immunity from prosecution may be obtained by a prospective defendant, or any witness, only by strict compliance with procedural requirements of our immunity statutes properly enacted (Matter of Doyle, 257 N. Y. 244, 257-268, opinion by Cardozo, Ch. J.), or by virtue of immunity provisions of our State Constitution (e.g. Art. XIII, §3*).

This court in *Stevens* v. *Marks*, 383 U. S. 234, 242, held that immunity may be granted provided that certain procedural steps are taken:

> (a) the witnesses must refuse to answer on the ground of self-incrimination;
>
> (b) the grand jury must then be "expressly requested by the prosecuting attorney to order such person to * * * answer";
>
> (c) the grand jury must then order the person to answer;
>
> (d) the witnesses must then comply with the order to answer; and
>
> (e) thereupon "immunity shall be conferred."

The trial record herein will show that the procedural requirements for granting immunity were not employed by the grand jury. The immunity, if at all, was voted by the grand jury prior to the testimony of the petitioners.

The court held in *People* v. *Laino, supra*, 174 that:

> the privilege against self-incrimination may not be asserted or claimed in advance of questions actually

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* But cf. with respect to Federal prosecution, *U. S. ex rel. Laino* v. *Warden of Wallkill Prison*, 246 Fed. Supp. 72, affirmed 355 Fed. 2d 208 (C. A. 2).

propounded (*King* v. *Liotti*, 190 Misc. 652, 672; *Matter of Weiner*, 183 Misc. 267; *Radin* v. *Kornreich*, 17 Misc. 2d 860; *People* v. *Ryan*, 6 N. Y. 2d 975, 977, dissenting opinion, Burke, J.)

It should reasonably follow that a blanket immunity cannot be granted.

3. The area under investigation by the particular grand jury before whom petitioners appeared *was preempted by the Federal government.*

The grand jury was investigating the advocacy of the overthrow of the government of the State of New York.[5] In particular, the investigation centered on the supposed subversive activities of a communist political organization known as the Progressive Labor Movement.

This entire area of political subversion has been preempted by the Federal government through the enactment of such legislation as the Smith Act, 18 U. S. C. §2385. See *Pennsylvania* v. *Nelson*, 350 U. S. 497; cf. *Albertson* v. *Millard*, 345 Mich. 519, 77 N. W. 2d 104; *Louisiana* v. *Jenkins*, 236 La. 300, 107 So. 2d 648; *Braden* v. *Kentucky*, 291 S. W. 2d 843 (Ky. Ct. of App.); *Massachusetts* v. *Gilbert*, 334 Mass. 71, 134 N. E. 2d 13.

Absent jurisdiction to investigate, the grand jury was without power to direct the filing of informations against petitioners for their refusal, on constitutional grounds, to

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[5] Prior to the appearance of petitioners before the grand jury, an indictment had already been handed down by that same body charging one William Epton with criminal anarchy, in violation of §160 of the New York Penal Law.

answer questions before that body. cf. *Watkins* v. *U. S.*, 354 U. S. 178; *Russell* v. *U. S.*, 369 U. S. 749; *Deutch* v. U. S., 367 U. S. 456; *In re Green*, 369 U. S. 689.

a. The power and authority to grant immunity in the area of subversion and internal security vests solely and *exclusively with the Attorney General of the United States.*

The Federal Immunity Act, 18 U. S. C. §3486, vests sole and exclusive power to grant immunity from prosecution under the Smith Act, *supra*, the Internal Security Act, 50 U. S. C. §781 and related statutes, in the Attorney General of the United States. No court has such power, nor does any Grand Jury, nor even a committee of Congress. See *Ullman* v. *U. S.*, 350 U. S. 422.

Irrespective of whether the grand jury before whom petitioners appeared did or did not have authority to investigate in the area of subversion and internal security, it could not grant complete immunity to petitioners because of the preemptive provisions of the Federal Immunity Act.

The question raised here is not whether the Smith Act left any room for state anarchy prosecutions, but whether the Federal Immunity Act left any room for the states to grant immunity in cases involving violations of the Smith Act and related Federal statutes.

The trial court in the case at bar held that *Murphy* v. *Waterfront Commission of New York*, 378 U. S. 52, precluded the Federal government from using the testimony given by an immunized witness before a State grand jury in any federal prosecutions.

While this court in *Murphy* did lay down the constitutional rule that a state witness may not be compelled to give testimony which may be incriminating under federal law unless immunized from any federal prosecution utilizing his testimony or the fruits thereof, there was no consideration given there to the question now posed here.

In *Murphy,* there was no question of a statute in which Congress, acting in an area where it has "paramount authority" (*Ullman* v. *U. S., supra,* at p. 436) under the Federal Constitution, has expressly limited the authority to grant immunity solely to the Attorney General of the United States.

Profound questions affecting the security of the United States are at once raised if it be assumed that any State grand jury could effectively insulate a witness from prosecution under one of the federal internal security statutes by examining him in this area after a grant of immunity had been given, regardless of the nature and purpose of the State grand jury investigation.

4. Petitioners were not fairly and fully advised of their rights when before the grand jury.

Petitioner McAdoo was found in contempt of the grand jury on his testimony of September 30, 1964. He was not advised that immunity had been granted him that day with respect to any testimony he would be giving. He was told that immunity had been conferred by the grand jury "the last time you were here" (270). He was further advised that (272):

> • • • in refusing to answer, after you have been directed to answer, and after immunity is conferred upon you, you commit a misdemeanor • • •

At no time was a vote taken to confer immunity "after" a direction to answer.

Petitioner Anderson was found in contempt of the grand jury on her testimony of September 30, 1964. She was not advised that immunity had been granted her that day with respect to any testimony she would be giving. She was told that immunity had been conferred by the grand jury "prior to" appearing (370). At no time was immunity voted by the grand jury after the petitioner refused to answer a question.

Petitioner Douglas was found in contempt of the grand jury on his testimony of September 30, 1964. At no time during such testimony of September 30 was the petitioner advised that immunity had been conferred upon him by the grand jury (571-584).

After petitioner Barnett had refused to testify, the District Attorney merely advised him that the grand jury had voted to

> "confer immunity upon you for any questions you give—answers you give" (726).

No further explanation was given to this witness of the extent and scope of the proffered immunity or indeed, of the nature of immunity itself..

After petitioner Crenovich had been advised that the grand jury had conferred immunity upon him, he contin-

ued to invoke his privilege against self-incrimination. The District Attorney never informed Crenovich that the prior grant of immunity precluded the assertion of the privilege. On the contrary, the District Attorney asked the witness whether he had invoked the privilege in good faith (675). Thus, Crenovich may have been misled into believing that he was protected by the privilege as long as its assertion was in good faith.

Petitioners were thereby not fully and fairly apprised of their rights in violation of due process and in derogation of their privilege against self-incrimination. *Malloy* v. *Hogan*, 378 U. S. 1, *Stevens* v. *Marks*, *supra*.

As this Court stated in *Stevens*

> "A witness has, we think, a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that immunity, as broad in scope as the privilege it replaces, is available and applicable to him." 383 U. S. at p. 246.

5. The petitioners were deprived of their right to a trial by jury by the prosecution initiating the proceedings by informations instead of by indictments.

Criminal contempt is a misdemeanor in New York (§600, Penal Law) punishable by imprisonment for not more than one year, or by a fine of not more than $500, or both (§1937, Penal Law).

Article 1, §2 of the New York Constitution declares the right to a jury trial and §6 of that same article requires that "infamous crimes" be charged by indictment only.

However, Article 6, §18 of the Constitution permits the legislature to authorize a court of original jurisdiction to try a criminal case without a jury,

"other than crimes prosecuted by indictment."

While misdemeanors may and often are tried by indictment, it is the District Attorney who has the unbridled discretion as to whether he will seek an indictment or proceed by way of an information. It is the prosecutor's mode of selection that will determine whether a defendant charged with a misdemeanor will have the right to a trial by jury.

In New York State and in the City of New York, prosecutions for criminal contempt have almost invariably been by indictment and not by information, thus assuring to the defendant the right to a jury trial. See e.g. *People* v. *Post Standard Co.*, 13 N. Y. 2d 185; *People* v. *Saperstein*, 2 N. Y. 2d 210; *People* v. *Riela*, 7 N. Y. 2d 571; *People* v. *Malone*, 9 A. D. 2d 658; *People* v. *Vitale*, 18 A. D. 2d 660; *People* v. *Berson*, 284 App. Div. 1059; *People* v. *Berardi*, 41 Misc. 2d 736.

The Criminal Court of the City of New York has jurisdiction of all misdemeanors committed within New York City, with the single exception of criminal libel (§31(1), New York City Criminal Court Act).

§40 of the Criminal Court Act provides that

"All trials in the court shall be without a jury."

The New York Court of Appeals has upheld the constitutionality of the restrictive provisions noted above.

See e.g. *People* v. *Erickson*, 302 N. Y. 461; *People* v. *Bellinger*, 269 N. Y. 265; *People ex rel. Frank* v. *McCann*, 253 N. Y. 221.

In addition, while a person charged with a misdemeanor in the Criminal Court of the City of New York may obtain a trial by three judges, the New York Court of Appeals has held that due process does not require that there be unanimity in order to convict. *People* v. *DeCillis*, 14 N. Y. 2d 203.

In view of the length of the sentence which may be imposed for criminal contempt, that crime is an "infamous one", and the provisions of the New York Constitution and the New York City Criminal Court Act abolishing the right to a trial by jury are unconstitutional on their face and as applied to defendants who are tried in the City of New York. *U. S.* v. *Barnett*, 376 U. S. 681, 728 (dissenting opinion); *Cheff* v. *Schnackenberg*, 384 U. S. 373.

In addition to the power residing with the prosecutor to deny a defendant the right to a trial by jury, he has the absolute discretion to prosecute a defendant for the identical offense of criminal contempt pursuant to §750 of the Judiciary Law of New York, the punishment for which is thirty days imprisonment and a fine of $250.

This unbridled discretion in the manner of prosecuting a defendant for criminal contempt for the identical offense constitutes a deprivation of the equal protection of the laws.

Indeed, a defendant prosecuted under §750 of the Judiciary Law is afforded greater protection than one

prosecuted pursuant to §600 of the Penal Law, inasmuch as the defendant in the former proceeding must be advised of the relevancy of the questions by the Court before whom he is brought prior to prosecution. cf. *Koota* v. *Columbo*, 17 N. Y. 2d 147.

6. The prosecutor cannot, consistent with procedural due process, multiply contempts by repeatedly questioning a witness on the same subject of enquiry after a refusal to answer.

In each case the petitioners were asked questions which are the subject of the contempt charges on the same day and relate to the same subject matter.

In *Yates* v. *U. S.*, 355 U. S. 66, 73, this court held:

> However it is equally clear that the prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry within which a recalcitrant witness already has refused to answer. See *U. S.* v. *Orman* (C. A. 3rd N. J.) 207 F. 2d 148.

On this same point the court in *People* v. *Riela*, 7 N. Y. 2d 571, 576-578, held that a witness committed only one contempt and his conviction of seventeen (17) separate crimes was "impermissible". The same was held in *People ex rel. Amerante* v. *McDonnell*, 100 N. Y. S. 2d 463, which involved seven (7) questions.

See also, *U. S.* v. *Kamin*, 133 F. Supp. 382.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Crenovich and Barnett.

Certificate of Service

I hereby certify that I have this day served the within document upon all parties of record in this proceeding by mailing via first class mail, postage prepaid, a copy to each party. I further certify that I have this day mailed to the District Attorney of New York County, the Attorney General of the United States and the Solicitor General of the United States copies of this document.

Dated: New York, N. Y.
February 10th, 1967

STANLEY FAULKNER

APPENDIX A

Opinion of Criminal Court of the City of New York

WILLIAM E. RINGEL, P. J. The defendants are each charged with violation of subdivision 6 of section 600 of the Penal Law (criminal contempt); as a misdemeanor.

They appeared before the Second August 1964 Grand Jury, pursuant to subpoena, were sworn, and refused to answer certain questions,* after immunity had been con-

---

* WILLIAM MCADOO

FIRST COUNT:

Q. Mr. McAdoo, when did you become a member of the Labor Movement, if you did become a member of the Labor Movement?

SECOND COUNT:

Q. Mr. McAdoo, during the July riots in New York County, were you present at the offices of the Progressive Labor Movement, on Lenox Avenue and did you at that time demonstrate how a Molotov cocktail is made?

THIRD COUNT:

Q. Mr. McAdoo, I show you Grand Jury Exhibit No. 15, which is a leaflet which says:

Harlem Freedom Fighters.
How to make a Molotov cocktail.

I ask you whether you have ever seen that document before?

FOURTH COUNT:

Q. During the July riots in New York County did you and William Epton agree to incite further riots?

DAVID DOUGLAS:

FIRST COUNT:

Q. Mr. Douglas, did you agree and conspire with William Epton to incite further rioting in New York County during July of this year?

(footnote continued on next page)

ferred. This Grand Jury had been impaneled for the purpose of determining if a conspiracy existed to instigate the Harlem riots of July, 1964, and to inquire into acts relating thereto. Anderson executed a limited waiver of immunity, not pertinent here. Douglas alone was advised as to the purpose of the inquiry. The defendants were tried separately on informations ordered filed by the Grand Jury.

(footnote continued from previous page)

THIRD COUNT:

Q. Subsequent to your appearance here, have you discussed your testimony with other members of the Progressive Labor Movement, namely William Epton, William Anderson, Abraham Hart, Harold Young?

VIVIAN ANDERSON

SECOND COUNT:

Q. Did you and William Epton agree to incite further riots in New York County in January of this year?

THIRD COUNT:

Q. Were you present in the office of the Progressive Labor Movement in July of this year with William Epton and discussed with him and another individual the possession of forty Molotov cocktails?

FOURTH COUNT:

Q. Did you hear William Epton discuss the purchase of firearms for use at the Progressive Labor Movement?

NATHANIEL BARNETT

FIRST COUNT:

Q. Mr. Barnett, where were you during the riots here in New York City in July of this year?

MICHAEL CRENOVICH

FIRST COUNT:

Q. Are you a member of the Progressive Labor Movement?

THIRD COUNT:

Q. Who else do you know at the Harlem Defense Council?

However, we decide each case in one opinion on the grounds common to all.

The defenses interposed (see numbered headings, *infra*) will be treated seriatim.

1. *Prosecution for a violation of Penal Law subdivision 6 of section 600 may only be had by indictment (e.g., Penal Law § 602).*

We do not read section 602 of the Penal Law as mandating prosecutions thereunder by indictment only. An information charging contempt as a misdemeanor is authorized (*People ex rel. Frank* v. *McCann,* 253 N. Y. 221). This court has jurisdiction to try this offense (N. Y. City Crim. Ct. Act, §§ 31, 33, subd. [10]).

2. *"To incite to riot" is not a crime in this State. The investigation is therefore a nullity.*

The informations herein charge that the Grand Jury was conducting "an investigation to determine whether violations of the Penal Law relating to conspiracy to incite to riot occurred." If the Grand Jury were investigating a nonexistent crime, this objection would be well taken (*Matter of Wood* v. *Hughes,* 11 A D 2d 893; Code Crim. Pro., § 245). The language used in the informations, reasonably construed, lends itself to no such interpretation. The word "incite" means "instigate" (Black's Law Dictionary [4th ed., 1951], p. 905): it means "to urge on; stimulate or prompt to act" (American College Dictionary). Words must be accorded their natural and obvious

meaning (McKinney's Cons. Laws of N. Y., Book 1, Statutes, §§ 94, 232; *Matter of Young* v. *Gerosa*, 11 A D 2d 67). The subject of the Grand Jury inquiry was whether a conspiracy existed to instigate or stimulate a riot and to determine if violations of the Penal Law occurred relating thereto.

It might be added that conspiracy to commit a crime constitutes a separate and independent crime (*People* v. *Cadle*, 202 Misc. 415). It does not merge into the actual commission of the crime (*People ex rel. Thornton* v. *Becker*, 188 Misc. 181). It is clear from the record that the Grand Jury inquiry concerned itself with two separate crimes, conspiracy and riot. An inquiry into the crimes of conspiracy and riot were proper subjects of the Grand Jury's investigation (Penal Law, §§ 580, 2090, 2091).

3. *The questions asked were not legal and proper.*

A "legal" question is one "required or permitted by law" (Black's Law Dictionary [4th ed.]). A "proper" question is one that is "fit, suitable or appropriate" (Black's Law Dictionary, *ibid*). In any legal proceeding a determination of what is a legal and proper question will depend on the issues involved or likely to become involved (*Van Dyke* v. *Doughty*, 174 Mich. 351). The purpose of a Grand Jury inquiry is to ferret out facts which will enable it to determine whether formal charges should be made against someone. It is not the purpose of a Grand Jury to try offenders (*United States* v. *McGovern*, 60 F. 2d 880).

Appendix A

Though illegal evidence may not be the basis for a Grand Jury indictment or information (*Matter of Cole* [*Reiss*], 208 Misc. 697), wide latitude and scope must be afforded a Grand Jury in propounding its questions to witnesses. The purpose of a particular Grand Jury inquiry, by the very nature of its secrecy (Code Crim. Pro., § 258), lies peculiarly within the knowledge of that body. As the investigation proceeds, leads may be developed which will enable it to discover the truth. The competency, relevancy and materiality of questions propounded are not the concern of a witness (*United States* v. *McGovern, supra*), though they may be the concern of a defendant.

Though no specific case in point has come to the court's attention relative to what constitutes a legal and proper question that may be asked of a Grand Jury witness, there are some cases that indicate how broad such interrogations may be. In *People ex rel. Sillifant* v. *Sheriff* (6 N Y 2d 487), the court sustained a Grand Jury in its power to require the petitioner to complete a questionnaire as to the financial status, not only of himself, but also that of all members of his household. (See, also, *People* v. *"John Doe"* [*Byk*], 247 App. Div. 324.)

On the other hand, in *Matter of Nelson* v. *Hand* (23 Misc 2d 1077), the court in a similar situation refused to direct answers to questions that were ambiguous.

We conclude therefore that a question asked of a witness before a Grand Jury, duly impaneled, conducting an inquiry to determine if a crime has been committed, where

such witness has waived or duly received immunity in a case where such immunity may be lawfully conferred, is a legal and proper question if it relates generally, though broadly, to the subject matter of the inquiry and providing further that the question is clear and unambiguous. (*People* v. *"John Doe"* [*Byk*], *supra.*) What constitutes a legal and proper question is a question of fact (*People* v. *Amarante,* 100 N. Y. S. 2d 677).

Even if "it is [requested] to scrutinize with acute legalism the propriety or relevance of the subject of inquiry of a witness" before a Grand Jury (*People* v. *"John Doe"* [*Byk*], *supra,* p. 326), we hold that the questions asked were legal and proper. They were probative of the investigation. They were asked in order to obtain evidence which would have an effective influence and would logically tend to prove or disprove the existence of the crimes under investigation. We except from this determination only the question put to McAdoo, which is the basis of the first count of the information filed against him. That question is not legal and proper by reason of its ambiguity.

4. *Failure to advise the defendants of the purpose of the Grand Jury investigation precludes a prosecution for contempt.*

We find no authority for this contention. The cases hold to the contrary (*United States* v. *McGovern, supra; People* v. *"John Doe"* [*Byk*], *supra*). The authorities cited by defendants are not applicable (*Watkins* v. *United States.*

354 U. S. 178; *Deutch* v. *United States,* 367 U. S. 456; *Russell* v. *United States,* 369 U. S. 749).

These cases deal with Congressional investigating committees authorized under a Federal statute (U. S. Code, tit. 2, § 192) by which, Congressional jurisdiction of an inquiry, disclosure of the subject matter of the inquiry and pertinency of the questions to such subject matter are specifically required.

The case of *Malloy* v. *Hogan* (378 U. S. 7), also cited, is likewise not in point. Malloy who appeared as a witness in a statutory inquiry had not received full immunity (*Hoffman* v. *United States,* 341 U. S. 479; *People ex rel. Taylor* v. *Forbes,* 143 N. Y. 219).

It must be borne in mind that Grand Jury inquiries are secret (Code Crim. Pro., § 258). This secrecy has been zealously guarded both at common law and under statutes (*People* v. *Dunbar Contr. Co.,* 82 Misc. 174). There are cogent reasons behind this policy of secrecy. They are aimed at preventing an accused from escaping before he is indicted, from tampering with witnesses, and protecting an accused person who is not indicted, from unwarranted exposure (8 Wigmore, Evidence [3d ed.], § 2360).

To compel a Grand Jury to divulge the purpose of its investigation to a witness who incidentally is not sworn to secrecy (*People* v. *Naughton,* 38 How. Prac. 430), would defeat this policy and render nugatory many Grand Jury investigations.

5. *Compulsive testimony of a witness before a Grand Jury is violative of the Fifth Amendment.*

Defendants urge that testimony they were required to give this Grand Jury might be used against them in a Federal prosecution. They cite *Murphy* v. *Waterfront Comm.* (378 U. S. 52) as authority.

This case specifically held that as to compelled testimony given by an immunized witness in a State proceeding, the Federal Government is precluded from using such testimony or its fruits, in any criminal prosecution of that witness. (See, also, *United States* v. *Interborough Delicatessen Dealers Assn.*, 235 F. Supp. 230.)

Defendants also cited *People* v. *De Feo* (308 N. Y. 595). This case is likewise no authority for their position. Full immunity had not been conferred on De Feo. (*Matter of Grand Jury* [*Cioffi*], 10 A D 2d 425, affd. 8 N Y 2d 220.)

6. *Questions relative to the printing of posters were violative of the First Amendment.*

The posters in question described the manufacture and use of Molotov cocktails, a highly explosive instrument. It is sufficient to say in this regard that the Constitution does not protect speech or press which instigates riot (*Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Dennis* v. *United States*, 341 U. S. 494).

Sections 584 and 2097 of the Penal Law authorize the granting of immunity by a Grand Jury in its investigation of conspiracy and riot. Such immunity was duly conferred

on each defendant. The procedural requirements set forth in section 2447 of the Penal Law, were, according to the evidence, fully adhered to. Failure of the defendants to answer the question propounded under these circumstances was contumacious and willful. We find also that such refusals were accompanied with the intent to impede the investigation and to interfere with the administration of justice. Such willful acts of the defendants, committed after immunity had been conferred, constitute violations of subdivision 6 of section 600 of the Penal Law. (*Matter of Ushkowitz* v. *Helfand,* 15 N Y 2d 713; *Matter of Di Biasi* v. *Schweitzer,* 22 A D 2d 684; *People* v. *Franzese,* 24 Misc 2d 355; *People* v. *John Doe* [*Berger*], N. Y. L. J., Feb. 15, 1965, p. 17, col. 2.)

Excepting the first count (*McAdoo*), *supra,* each defendant is found guilty of each count in the respective informations.

Concur: KERN and MATZKIN, JJ.

APPENDIX B

Opinion on Pre-Trial Motions to Dismiss Informations

NEW YORK CITY CRIMINAL COURT

NEW YORK COUNTY

Docket Numbers
B 8207
B 8989
B 8990
B 8991
B 8993

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

against

NATHANIEL BARNETT and others,

Defendants.

HON. FRANK S. HOGAN, District Attorney, for the People (Assistant District Attorney, Robert T. Hartmann, of counsel.

STANLEY FAUKNER, Esq.)
SANFORD M. KATZ, Esq.) for the Defendants.

OPINION

January 19, 1965

JUDGE ARTHUR BRAUN

These are motions to dismiss informations charging five defendants with criminal contempt, and an additional

charge of perjury in the second degree against one of them, at the direction of the Grand Jury of New York County.

The Grand Jury is investigating the crime of conspiracy to violate the riot section of Article 188 of the Penal Law.

The several grounds for dismissal advanced which affect all the defendants will first be considered.

This court has jurisdiction to try all misdemeanors except libel, New York City Criminal Court Act (Article III Section 31). Sections numbered 41 and 42, state that all charges tried in this court shall be by written information.

In People ex rel. Frank v. McCann, 253 N. Y. 222, the court said:

> "The purpose to confer upon the Court of Special Sessions jurisdiction to determine, in the first instance, all charges of misdemeanors except libel committed within the City of New York is also indisputably plain. * * * and that the jurisdiction of the Court of Special Sessions to try for that misdemeanor is not divested except in the event of an indictment,"

As indicated, after reorganization, the rule is still the same.

The defendants allege that there is no such crime as "conspiracy to incite a riot" as set forth in these informations. They are not so charged here.

While this court is only concerned with criminal contempt (Sect. 600 of the Penal Law, Subd. 6) and Perjury

in the Second Degree (Sections 1620 and 1620b of the Penal Law); it may be pointed out that the reference to "conspiracy to incite a riot" is descriptive of the crime of conspiracy to riot under investigation.

Section 2090 of the Penal Law defines the crime of riot and 2091, the punishment section, states in part, "a person guilty of riot, or of participating in a riot, either by *instigating*, promoting, or aiding the same, is punishable as follows:"

Instigating is defined in Webster's New World Dictionary (1951-52) at page 755 "to stimulate, incite . . . urge on . . . incite to some action . . . to cause by inciting, foment . . .". Black's Law Dictionary (4th Ed. 1951) page 905 is to the same effect.

The Grand Jury is properly investigating the crime of conspiracy to riot.

Complete immunity was granted these defendants in accordance with Section 2447 of the Penal Law. They claimed their privilege against self incrimination and they were directed by competent authority to testify. The Grand Jury minutes disclose that they were informed that they were witnesses and not defendants. (Matter of the Grand Jury (Cioffi), 10 App. Div. 2d 425, affd. 8 N. Y. 2d 226).

In fact in People v. Breslin (306 N. Y. 294, 297) the court said after the granting of immunity

> "It follows, therefore, that defendant was not entitled to remain silent, even if, he urges, he believes

himself one of the targets of the investigation rather than a mere witness."

The above was also quoted with approval in People v. Feinberg (19 Misc. 2d 433) at page 437.

It is now well settled that a witness given immunity in state courts is equally protected from Federal prosecution. (Murphy v. Waterfront Commission of New York Harbor, 378 U. S. 52 (1964.)

It is contended that the information be dismissed because the defendants were not informed of the purpose of the investigation.

It is our belief that this is not before this court for consideration. The charge as indicated earlier is for violation of Sections 600 and 1620 and 1620b.

This point was very recently ruled upon (November 17, 1964) by the United States Court of Appeals for the Second Circuit, in the Matter of United States of America v. Anthony Castaldi, reported in the New York Law Journal, January 12, 1965. The Court stated,

> "The only question in the contempt proceeding was whether Castaldi wrongfully refused to obey court orders; not whether he conspired to sell narcotics."

The defendant had been subpoened to testify before a Federal Grand Jury investigating illicit narcotics traffic.

A reading of the Grand Jury minutes, nevertheless, reveals that one of the defendants, Douglas, had been ad-

vised directly that the Harlem riots were the subject of the investigation. The other defendants had many questions asked as to some facet of the riots, the Harlem Defense Council, the Progressive Labor Movement, or as to various exhibits submitted to the Grand Jury such as handbills or posters entitled "Stop the Killer Cops Now", "Wanted For Murder . . . Gilligan the Cop", "Harlem Freedom Fighters . . . How to Make a Molotov Cocktail", and several others of like content.

In fact the propounded questions on which the defendants were cited for contempt were all relevant to the inquiry of the Harlem riots. It is apparent the defendants could not be in ignorance of the purpose of the inquiry.

The People v. DeFeo, 208 N. Y. 595, cited by the defendants was reversed on the grounds that the defendant had not been granted "full statutory immunity" and the court indicated there that it would have been affirmed otherwise. DeFoe had also asserted lack of knowledge of the purpose of the inquiry.

At each meeting of the Grand Jury the minutes set forth on the title page the date and the following legend: "Before: A Quorum of the Second August 1964 Grand Jury", and then the names of the assistant district attorneys and the name of the reporter.

The defendants assert that there is no proof that a quorum of the Grand Jury was present. "There is a presumption of regularity." (People v. Riela (14 Misc. 2d

213, 217). While the quantum of documentary proof such as obtained in the Riela case is not before me, the presumption of regularity was not overcome.

The motions as to all the defendants denied in all respects, except as to defendant Crenovich the motion is denied except as to counts marked Second and Fourth for Criminal Contempt and Fifth for Perjury in the Second Degree the motion is granted; and as to Anderson the motion is denied except as to count marked First the motion is granted; and as to Douglas the motion is denied except as to counts Second and Fourth the motion is granted.

Submit order.

APPENDIX C

Certificate of Court of Appeals of the State of New York Denying Leave to Appeal

STATE OF NEW YORK

COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

WILLIAM McADOO, VIVIAN ANDERSON, DAVID DOUGLAS, MICHAEL CRENOVICH and NATHANIEL BARNETT,
Defendants-Appellants.

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, certify that the above-named appellants, through their attorneys, Sanford M. Katz, Esq., and Stanley Faulkner, Esq., after notice to the District Attorney of New York County, and within the time and in the manner prescribed by §520 of the Code of Criminal Procedure, duly presented to me an application for a certificate that questions of law were involved in the above matter which ought to be reviewed by the Court of Appeals.

In such application, seeking leave to appeal from the order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered on the 9th

day of June, 1966, affirming the judgments of the Criminal Court of the City of New York, County of New York, entered on April 5, 1965, convicting the appellants of criminal contempt in violation of §600 subdivision 6 of the Penal Law, it was argued that their convictions violated their rights under Article III and under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution in that (1) they were not proceeded against by way of an indictment but by an information filed by the District Attorney which necessarily resulted in their being deprived of their rights to a trial by jury; (2) when before the Grand Jury, they were not advised of the purpose of its investigation or of the pertinency of the questions which they refused to answer to the topic under investigation; (3) they were compelled to testify before the Grand Jury in violation of their rights against self incrimination and without any effective grant of immunity from prosecution and without being fully and fairly advised of their rights before that body; (4) the area under investigation by the Grand Jury had been preempted by the federal government; (5) immunity from prosecution could only have been granted by the Attorney General of the United States by virtue of the preemptive provisions of 18 U. S. C. §3486 and the purported grant of immunity by the Grand Jury was a nullity; and (6) the unbridled discretion residing with the District Attorney to proceed against these appellants for criminal contempt as a misdemeanor or by way of a contempt proceeding under §750 of the Judiciary Law for the identical offense and with disproportionately

severe consequences deprived them of the equal protection of the laws.

After hearing counsel and upon the record and proceedings herein, I am denying permission to appeal because, in my opinion, no question of law is presented which ought to be reviewed by the Court of Appeals.

Dated:
New York, New York
September 16, 1966

STANLEY H. FULD
Associate Judge of the
Court of Appeals

APPENDIX D

Order of Court of Appeals of the State of New York Granting Stay of Judgment

Before: HONORABLE STANLEY H. FULD

Associate Judge of the Court of Appeals
of the State of New York

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

WILLIAM McADOO, VIVIAN ANDERSON, DAVID DOUGLAS, MICHAEL CRENOVICH and NATHANIEL BARNETT,
Defendants-Appellants.

The defendants-appellants having heretofore on the 22nd day of March, 1965, been convicted of the crime of criminal contempt (§600 subdivision 6 of the Penal Law) in the Criminal Court of the City of New York, New York County, and sentenced on the 5th day of April, 1965 to a term of four (4) months imprisonment, and the judgments of conviction having been affirmed by the Appellate Term of the Supreme Court of the State of New York, First Department, on the 9th day of June, 1966, and permission to appeal to the Court of Appeals having been denied by me on the 16th day of September, 1966.

And no previous application for a stay having been made,

And upon the consent of the District Attorney of New York County by Michael R. Stack, Assistant District Attorney,

Appendix D

And in order that the defendants-appellants may have adequate opportunity to present their petition for certiorari to the Supreme Court of the United States,

And after hearing Sanford M. Katz, Esq., one of the attorneys for the defendants-appellants, it is hereby

ORDERED, that the judgments hereinabove referred to be and they are in all respects stayed pending the hearing and determination of the merits of a petition for certiorari by the Supreme Court of the United States, and it is further

ORDERED, that the bail heretofore fixed in the sum of $1,000 for defendants-appellants William McAdoo, Vivian Anderson, Michael Crenovich and Nathaniel Barnett, and in the sum of $2,500 for defendant-appellant David Douglas be continued, and it is further

ORDERED, that the stay shall become inoperative in the event that a petition for certiorari is not timely docketed in the Supreme Court of the United States, and it is further

ORDERED, that the original of this order be filed in the office of the Clerk of the Criminal Court of the City of New York, New York County and that a copy thereof be served upon the District Attorney of New York County forthwith.

Dated: New York, New York
16 September 1966

s/ STANLEY H. FULD
Associate Judge of the
Court of Appeals of the
State of New York

APPENDIX E

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1966

WILLIAM MCADOO, et al.,

Petitioners,

v.

NEW YORK

UPON CONSIDERATION of the application of counsel for petitioners,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 13, 1966.

JOHN M. HARLAN
Chief Justice of the United States.

Dated this 9th
day of December, 1966

Office-Supreme Court, U.S.
FILED
APR 14 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 1061

WILLIAM MCADOO, VIVIAN ANDERSON, DAVID DOUGLAS, MICHAEL CRENOVICH, NATHANIEL BARNETT,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of the State of New York, County of New York, First Department

RESPONDENT'S BRIEF IN OPPOSITION

FRANK S. HOGAN,
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013

MICHAEL JUVILER
MICHAEL R. STACK
Assistant District Attorneys
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1966

No. .....

WILLIAM MCADOO, VIVIAN ANDERSON, DAVID DOUGLAS, MICHAEL CRENOVICH, NATHANIEL BARNETT,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of the State of New York, County of New York, First Department

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to the Appellate Term of the Supreme Court of the State of New York, County of New York, First Department, to review a decision of that court, entered June 9, 1966, affirming, without opinion [51 Misc. 2d 263], a judgment of the Criminal Court of the City of New York, County of New York, convicting the petitioners after separate trials of the misdemeanor of CRIMINAL CONTEMPT [N. Y. Penal Law, §600(6)] (45 Misc.

2d 664). Each petitioner was sentenced to serve a term of four months' imprisonment.

On September 16, 1966, leave to appeal to the Court of Appeals of the State of New York was denied by Associate (now Chief) Judge STANLEY H. FULD. Judge FULD noted that:

> "it was argued that their convictions violated their rights under Article III and under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution in that (1) they were not proceeded against by way of an indictment but by an information filed by the District Attorney which necessarily resulted in their being deprived of their rights to a trial by jury; (2) when before the Grand Jury, they were not advised of the purpose of its investigation or of the pertinency of the questions which they refused to answer to the topic under investigation; (3) they were compelled to testify before the Grand Jury in violation of their rights against self incrimination and without any effective grant of immunity from prosecution and without being fully and fairly advised of their rights before that body; (4) the area under investigation by the Grand Jury had been preempted by the federal government; (5) immunity from prosecution could only have been granted by the Attorney General of the United States by virtue of the preemptive provisions of 18 U.S.C. §3486 and the purported grant of immunity by the Grand Jury was a nullity; and (6) the unbridled discretion residing with the District Attorney to proceed against these appellants for criminal contempt as a misdemeanor or by way of a contempt proceeding under §750 of the Judiciary Law for the identical offense and with disproportionately severe consequences deprived them of the equal protection of the laws."

In the instant petition, petitioners renew these claims, and also assert that they were not fully and fairly advised of their rights before the grand jury, and that the prosecutor multiplied contempt counts by repeated questions on the same subject which they had previously refused to answer.

An enlargement of time to file the petition was granted by Mr. Justice HARLAN (petition, p. 41).

Introduction

In August of 1964, a New York County grand jury commenced an investigation into the riots which had taken place a month earlier in the Harlem area of the city, precipitated by the shooting of a Negro youth by an off-duty police officer. Specifically, as the prosecutor who conducted the investigation explained in the grand jury, the grand jury assembled "to determine whether the Progressive Labor Movement and its membership [had] conspired to commit the crimes of incitement to riot, and conspiracy to commit criminal anarchy" (501).* The several petitioners herein were each immunized against prosecution [N. Y. Penal L. §§584, 2447] and individually asked questions concerning the topic of the investigation. To a greater or lesser degree they responded to the prosecutor's inquiry; however, each witness balked at some stage of the proceeding and failed to answer one or more of the questions propounded. They were warned of the consequences of the course they had chosen to adopt—their persistence in refusing to answer the questions resulted in the grand jury voting to inform against them.

* References are to the typewritten record on appeal.

Trial on the contempt informations was held in the Criminal Court of the City of New York before a panel of three judges. Each defendant was tried separately; decision was reserved until all trials had concluded. On March 22, 1965, by a unanimous court, petitioner McAdoo was found guilty of three counts of Criminal Contempt for refusing to answer the following questions:

> "Mr. McAdoo, during the July riots in New York County, were you present at the offices of the Progessive Labor Movement, on Lenox Avenue, and did you at that time demonstrate how a Molotov cocktail is made?" (271).
>
> "Mr. McAdoo, I show you Grand Jury Exhibit No. 15, which is a leaflet which says:
>
> Harlem Freedom Fighters
>
> How to make a Molotov cocktail.
>
> I ask you whether you have ever seen that document before?" (274).
>
> "During the July riots in New York County did you and William Epton agree to incite further riot?" (275).

Petitioner Anderson was also found guilty of the same crime in that she had declined to reply to the following questions:

> "Did you and William Epton agree to incite further riots in New York County in January of this year?" (372).
>
> "Were you present in the office of the Progressive Labor Movement in July of this year with William Epton and discussed with him and another individual the possession of forty Molotov cocktails?" (374).
>
> "Did you hear William Epton discuss the purchase of firearms for use at the Progessive Labor Movement?" (375).

Petitioner Douglas was found guilty for failing to answer these questions:

> "Mr. Douglas, did you agree and conspire with William Epton to incite further riotings in New York County during July of this year?" (573).
>
> "Subsequent to your appearance here, have you discussed your testimony with other members of the Progressive Labor Movement, namely, William Epton, William Anderson, Abraham Hart, Harold Young?" (578-9).

Similarly, petitioner Crenovich was convicted for not replying to the following:

> "Are you a member of the Progessive Labor Movement?" (657-8).
>
> "Who else do you know at the Harlem Defense Council?" (677).

Lastly, Nathaniel Barnett's failure to respond to either of these queries resulted in his being convicted of the same crime:

> "Were you associated with Tri-line Offset Company Incorporated?" (727).
>
> "Mr. Barnett, where were you during the riots here in New York City in July of this year?" (727).

POINT I

The investigation by the grand jury of conspiracy to incite a riot (N. Y. Penal Law, §§2090, 2091) was not pre-empted by the Smith Act, the federal sedition statute [answering petitioners' Points 3 and 3a, pp. 12-14].

Petitioners assert that the grand jury was investigating the crime of criminal anarchy (N. Y. Penal Law, §160), a statute which, they contend, has been pre-empted by the enactment of the Smith Act (18 U.S.C. 2385), and that consequently, the State was precluded from delving into any violations of this federal law. As a corollary, they also claim that the State could not confer a valid immunity upon them, that right being reserved to the Attorney General of the United States, and hence, petitioners were fully justified in asserting their Fifth Amendment privilege.

But the premise upon which their argument rests—that the grand jury was investigating only the crime of criminal anarchy—is fundamentally incorrect. For the jury had undertaken to determine whether any violation of either the criminal anarchy statute or the statute prohibiting riot or incitement to riot [N. Y. Penal Law, §§2090, 2091] had been committed (501). In fact, the information upon which each petitioner was tried and convicted does not mention criminal anarchy, but plainly states that the grand jury was conducting "an investigation to determine whether violations of the Penal Law relating to conspiracy to incite a riot had occurred." Petitioners do not claim that this provision of the New York Penal Law (§§2090, 2091) has been supplanted by federal legislation, an argument

which would be difficult to espouse in any event, as the power to quell riots seems well within the police powers reserved to the States by the Federal Constitution. Instead, petitioners focus their attention on a statute which is not really in issue here—the criminal anarchy law.

But even their unwarranted attack upon that statute is incorrect on the grounds they maintain. Petitioners urge that the Smith Act (18 U. S. C. 2385) has effectively superseded and thus invalidated the provisions of the New York criminal anarchy statute, and cite as authority for the proposition this Court's decision in *Pennsylvania* v. *Nelson* [350 U. S. 497 (1956)]. Their analysis of the Court's holding in that case is inaccurate, for the decision in *Nelson* specifically held that state anti-sedition laws are superseded only insofar as they outlaw sedition against the federal government (*id.* at 499). And the Court took pains to point out (*id.* at 499) that the Supreme Court of Pennsylvania had found that there was no evidence whatever that Nelson uttered "a single word indicating a seditious act * * * directed against the Government of Pennsylvania" [*Commonwealth* v. *Nelson,* 377 Pa. 58 (1954)].

The limited extent of the federal pre-emption doctrine in the area of anti-sedition legislation was further emphasized in *Uphaus* v. *Wyman* [360 U. S. 72 (1959)]. Discussing the *Nelson* decision, the Court stated:

> "* * * The opinion made clear that a State could proceed with prosecutions for sedition against the State itself. * * * Nor did our opinion in *Nelson* hold that the Smith Act had proscribed state activity in protection of itself either from actual or threatened 'sabotage or attempted violence of all kinds.' In foot-

note 8 of the opinion it is pointed out that the States had full power to deal with internal civil disturbances'' (*id.* at 76-77).

Thus, New York's anarchy statute remains valid to the extent that it is directed to sedition against the State and localities within the State, a distinction with particular pertinence to this case, for, from the questions posed, it is clear that the inquiry was designed to determine whether petitioners and their associates were engendering further violence at a time when chaotic conditions reigned in the streets of New York City.

POINT II

The grant of immunity was in accordance with the procedures set forth in Section 2447 of the New York Penal Law; accordingly, the petitioners, having received full statutory immunity, were required to testify [answering petitioners' Point 2, pp. 10-12].

Petitioners have examined the procedures whereby immunity was conferred upon each of them and profess to find error there. In each case, the record clearly shows, the grand jury was duly asked to vote on whether to grant the witness immunity prior to his actual appearance before that body. After he or she appeared and refused to testify on grounds of privilege, the witness was informed of the jury's decision and the foreman, at the request of the assistant district attorney, then directed the witness to respond. Petitioners assert that the state statute mandates that the vote to confer immunity must follow the witness' refusal, and that hence, the grant of immunity was

defective. But they fail to demonstrate a federal question, particularly since they make no claim that they were in doubt, at the time they failed to testify, whether immunity had been effectively conferred [compare *Stevens* v. *Marks*, 383 U. S. 324 (1966)].

Moreover, petitioners' view of state law is incorrect. The pertinent statute (Section 2447 of the New York Penal Law) only ordains that the order by the competent authority (*e.g.*, the grand jury at the request of the district attorney) follow the refusal; it does not specify when the vote is to take place. In *People* v. *Laino* [10 N.Y.2d 161, 172 (1961)], the New York Court of Appeals summarized the immunizing process under Section 2447. To achieve its benefits a witness must:

> "(1) *affirmatively claim* his privilege against self-incrimination, (2) be directed or ordered to answer by competent authority, for instance, a Grand Jury at the request of the prosecutor, and (3) testify (*People* v. *DeFeo*, 3 N.Y.2d 595, 602-604, *supra*)" (emphasis in text).

This classic formulation was recently reiterated by this Court in *Stevens* v. *Marks* [383 U. S. 234, 242 (1966)]. Neither the Court's discussion of the New York statute, nor the statute itself, indicates the time at which the jury must vote to confer immunity.

In any event, as is noted above, the issue seems to be directed at the details of New York statutory procedure, and no federal question is raised thereby.

POINT III

The questions posed were relevant to the grand jury's investigation [answering petitioners' Point 1, pp. 7-10].

Petitioners contend that the failure of the assistant district attorney to notify them of the purpose of the inquiry and the materiality of each question to the investigation must vitiate the several contempt convictions. While agreeing that a witness before a grand jury, even under a grant of immunity, may refuse to reply to all but relevant questions, we submit that that principle has no application to the case at bar. For, except for petitioner Crenovich, none of the defendants questioned the pertinency of the questions to the purposes of the investigation, either in the grand jury or at trial. Nor, for that matter, do they contend in their petition to this Court that the questions were irrelevant. And surely, there is no abstract requirement that an interrogator explain the relevance of each and every question in the absence of a challenge to the question's materiality. Far from claiming irrelevancy, petitioners frivolously sought to interpose their Fifth Amendment privilege as ground for refusing to cooperate with the investigation. However, that privilege, as the prosecutor explained again and again, had vanished with the grant of immunity; and he further warned them that by persisting in a warrantless refusal to answer they each ran the risk of a contempt prosecution. Their failure to heed his advice resulted, of course, in the instant prosecutions.

In any event, both Douglas (501)—who frivolously claimed "harassment" (572)—and McAdoo (337-8) were

expressly notified of the subject of the grand jury's investigation. The assistant district attorney explained that the jury was inquiring "to determine whether the Progressive Labor Movement and its membership had conspired to commit the crimes of incitement to riot, and conspiracy to commit criminal anarchy". Prominent among the questions each witness failed to answer after being so informed were the following:

> "Mr. McAdoo, during the July riots in New York County, were you present at the offices of the Progressive Labor Movement, on Lenox Avenue, and did you at that time demonstrate how a Molotov cocktail is made?" (271).
>
> "Mr. Douglas, did you agree and conspire with William Epton to incite further riotings in New York County during July of this year?" (573).

The assertion that the prosecutor had to detail the pertinence of questions such as these to the hitherto disclosed subject of the investigation is little more than ludicrous.

Similarly, although neither petitioner Anderson nor Barnett was expressly informed of the subject of the grand jury's inquiry, the purpose of the investigation and the question's materiality to that purpose is self-evident on the face of the questions which they refused to answer. Moreover, petitioner Anderson had testified at length about the role the Progressive Labor Movement had played in both instigating and encouraging the continuance of the riots and had fully described her own part in that endeavor (390-427). Her sudden refusal to continue testifying along these lines cannot possibly be justified in terms of not comprehending the purpose or materiality of the interrogation; and, as was noted above, neither Anderson nor any other

of the petitioners asserted irrelevancy as a ground for refusing to reply to the questions.

Petitioners, of course, even in the absence of an objection on the ground of immateriality, could not validly be convicted for contempt unless the questions were in fact relevant to a clearly defined inquiry. Here, unlike the situation which existed in the cases of *Russell* (*Price*) v. *United States* [369 U. S. 749, 767 (1962)] and *Deutch* v. *United States* [367 U. S. 456 (1961)], the subject matter of the inquiry could be easily ascertained and the relevancy of the questions thereto easily determined. In *Russell* (*supra*) this Court reversed the judgment of conviction because the indictment failed to specify the subject under investigation at the time of the congressional sub-committee's investigation of the defendant. Nor could that subject be ascertained with any degree of certainty either on trial or appeal [369 U. S. at 767-8]. In *Deutch,* the subject under investigation was again obscure, and further, as an interrelated problem, the government had failed at trial to prove the pertinence of the questions to the purposes of the inquiry. In contrast, the trial court here held that the questions were germane to the subject of the grand jury inquiry [*People* v. *McAdoo,* 45 Misc. 2d 664, 668 (1965)], and further, the crime under investigation was clearly set forth on the face of the informations upon which the petitioners were each tried and convicted.

As noted above, petitioner Crenovich alone challenged the questions' pertinency, both in the grand jury and at trial. Crenovich refused to disclose whether he was a member of the Progressive Labor Movement (657), or to

reveal the names of other members, besides William Epton, of the Harlem Defense Council (677). Initially, it is important to note that Crenovich makes no claim in his petition that the broaching of these questions violated or otherwise tended to stifle any First Amendment rights [*cf. N. A. A. C. P.* v. *Alabama,* 357 U. S. 449 (1958)]. But even were such an assertion made, it is evident from what the investigation had revealed concerning the activities of the Progressive Labor Movement and the Harlem Defense Council during the riots that the State had "demonstrated an interest in obtaining the disclosures * * * sufficient to justify the deterrent effect * * * these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association" [*N. A. A. C. P.* v. *Alabama, supra* at 463].

Crenovich's questioning revealed that during the outbreak in Harlem his printing firm had issued several thousand copies of a bulletin entitled "Wanted for murder, Lieutenant Thomas Gilligan". These posters had been ordered by William Epton of the Harlem Defense Council (662). Whether the witness was himself a member of the conspiracy to cause riot, and further, the identity of other members of the unlawful combination was clearly within the ambit of the grand jury's investigation. In light of these questions, as well as the many others which were put to him concerning the subject of the riots (which had taken place but a short time previously), it is absurd for him to claim that he was in doubt as to the nature of the inquiry. On the other hand, it can fairly be said of Crenovich's testimony that he sought at every turn to frustrate and obstruct the investigation (see, *e.g.*, pp. 672-678) by re-

peatedly asserting that he could not recall events that had taken place only a short while before, and claiming the protection of the Fifth Amendment even when it had been patiently explained that its protections had been replaced by a grant of immunity. In short, the assertion that he was unaware of the purpose of the jury's inquiry was but another weapon in his arsenal to interfere with the investigation, and was properly disregarded by the New York courts.

POINT IV

Petitioners received adequate notice that immunity had been conferred; moreover, in most instances the issue has not been preserved for review [answering petitioners' Point 4, pp. 14-16].

The five petitioners claim that they were inadequately apprised of the existence of immunity from prosecution at the time of their refusals to answer. None of the petitioners claimed this in the grand jury. As to petitioners McAdoo, Anderson and Douglas, the claim is inappropriately raised here, for it was not raised in their pre-trial motions to dismiss the informations, or at trial (284-341, 449-74, 584-99), or on appeal to the Appellate Term. While these petitioners suddenly raised the claim before Judge FULD on application for leave to appeal to the Court of Appeals, the denial of leave to appeal may hardly be considered review on the merits by the entire court, or even by Judge FULD, in view of the failure to present the claim earlier; in any case, the writ of certiorari sought is one addressed to the Appellate Term, where the contention of lack of notice was not raised by these three petitioners.

Petitioner Barnett, by contrast, made such a claim in a pre-trial motion, at trial (738-9) and on the state appeal; however, in view of the absence of an opinion by the Appellate Term, or of an amendment of the remittitur—none having been sought—it is impossible to conclude with assurance that the claim was reviewed on Barnett's appeal. Similarly, as to petitioner Crenovich, no such claim was raised at trial (686-702), but petitioner raised the issue in a pre-trial motion and on appeal to the Appellate Term; again, however, the Appellate Term order does not state whether the issue was reviewed.

Against this background of unequivocal failure to preserve the question (petitioners McAdoo, Anderson and Douglas) and some ambiguity in the record as to its survival here (petitioners Barnett and Crenovich), we turn to the claim on the merits. Here the record is clear: all of the petitioners were adequately informed that they had complete immunity from prosecution when they refused to answer the questions.

Each petitioner, upon being brought before the grand jury, was instructed by the assistant district attorney that the jury had voted beforehand to confer immunity upon him, and that the immunity extended to protect him from any future prosecution for any crime which his testimony might reveal (McAdoo, 270-1; Anderson, 369-74; Douglas, 501-5; Crenovich, 625-6, 652, 657-8; Barnett, 725-8). This is, of course, an entirely satisfactory, if somewhat simplified, explanation of the safeguards embodied in the New York statute (Penal Law, §2447); thus it is difficult to comprehend the thrust of petitioners' argument that they were

not fairly advised of their rights. Particularly inasmuch as no question was, or is, raised as to the scope of the protection bestowed [compare *Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964)], or whether these protections applied to petitioners [see *Stevens* v. *Marks*, 383 U. S. 242 (1966)] That the prosecutor did not launch, as petitioners apparently feel he should have, into a detailed, complex explanation of the subtleties of the immunity statute, such as would satisfy one skilled in law, but rather explained its import in layman's terms, unquestionably benefited rather than harmed petitioners. Furthermore, petitioners were represented by counsel when they testified, their attorneys waiting right outside the grand jury room. They often requested and were given opportunity to consult with their attorneys (see, *e.g.*, record pp. 248, 251, 257).

It is further claimed that petitioner Crenovich could have been misled by the assistant district attorney's asking him, after immunity had been conferred, whether he was asserting the privilege in good faith (675). The record makes clear, however, that the prosecutor was simply incredulous that Crenovich would assert the privilege after having been given the following explanation, a short time before, which clearly indicated that he could no longer claim its protection:

> "Q. Mr. Crenovich, before you appeared here, last week, this grand jury voted to grant you immunity from prosecution from—for any crimes which your testimony discloses. I explained that to you then. Do you understand that?
>
> "A. Yes.

"Q. Your privilege against self-incrimination evaporates when the Foreman of this Grand Jury directs you to answer the question (652)".

Petitioners McAdoo, Anderson and Douglas, who testified on more than one occasion, claim that the explanation of their status on the first day was insufficient to apprise them that they had immunity thereafter, when they refused to answer on a later date. However, the record plainly reflects that both McAdoo and Anderson were advised of the conferral of immunity on the very day they refused to testify, and thus must have known that they were merely witnesses and not parties defendant (270-1, 370-2). As to petitioner Douglas, he appeared on three occasions before the grand jury—on two of those occasions he was painstakingly reminded of his role as a witness in the investigation (502, 565). Viewed with this background in mind his present claim that he had not been properly advised is preposterous.

POINT V

The failure to accord petitioners a jury trial presents no federal question [answering petitioners' Point 5, pp. 16-18].

Petitioners contend that certain provisions of the New York Constitution and Laws which provide for a non-jury trial in the cases of certain minor offenses, such as criminal contempt of court, are unconstitutional in that they deprive them of their right to a trial by jury. However, the guarantee contained in the Sixth Amendment to a trial by jury has never been held to be incorporated into the Fourteenth

Amendment, but operates only in restraint of Federal power, and has no application to the States [see *Malloy* v. *Hogan,* 378 U. S. 1, 4, fn. 2 (1964); *Maxwell* v. *Dow,* 176 U. S. 581, 596-7 (1900); *Hurtado* v. *California,* 110 U. S. 516 (1884)]. Moreover, this Court has consistently recognized that even under the Sixth Amendment there exists no right to a trial by jury in cases involving petty offenses [*United States* v. *Barnett,* 376 U. S. 681 (1964); *District of Columbia* v. *Colts,* 282 U. S. 63 (1930); *Schick* v. *United States,* 195 U. S. 65 (1904); *Lawton* v. *Steele,* 152 U. S. 133 (1894); *Natal* v. *Louisiana,* 139 U. S. 621 (1891)]. This exception has been engrafted onto the federal statutes governing criminal procedure [see 18 U.S.C. 1 (1964 ed.)] which define a petty offense as one which cannot be punished by more than six months' imprisonment; and just recently this Court has held that this statute permits a prosecution for criminal contempt for refusing to testify before a grand jury to be conducted by a court without a jury, providing, however, that the penalty imposed does not exceed six months [*Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966)]. In this respect, we note that none of the sentences imposed here exceeded four months.

POINT VI

The failure of the prosecution to initiate contempt proceedings against petitioners pursuant to Section 750 of the Judiciary Law of the State of New York did not deprive them of equal protection of the laws [answering petitioners' Point 5, pp. 18-19].

The New York statutes contemplate two methods for dealing with a recalcitrant witness before a grand jury: the first is to proceed by way of indictment or information pursuant to Section 600 of the Penal Law, which subjects an offender to a jail term of one year and the imposition of a $500.00 fine; the second is a proceeding whereby the witness is brought before a Justice of the Supreme Court and directed to respond—his failure to obey is deemed an act of *lèse majesté* and is summarily punishable, under the provisions of Section 750 of the Judiciary Law, by imprisonment for a term of thirty days and/or a fine of $250.00. Since the prosecutor can freely avail himself of either procedure, appellant urges that the disparity in sentences affords some contemnors greater protection of the laws than others. However, the "protection" gained under Section 750 is illusory, for Section 601 of the Penal Law states:

> "A criminal act is not the less punishable a crime, because it is also declared to be punishable as a contempt of court."

Section 602 provides further:

> "Punishment for a contempt, as prescribed in article nineteen of the judiciary law, does not bar an indictment [under Section 600] for the same offense; but where a person who has been so punished is convicted

on such an indictment, the court, in sentencing him, must take into consideration the previous punishment."

The prosecutor may or may not take advantage of the above provisions, and proceed against a particular witness to the full extent of the law. His failure to do so, on the other hand, does not deprive others similarly situated of the equal protection:

> "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged. *Oregon* v. *Hicks, supra;* cf. *Snowdon* v. *Hughes,* 321 U. S. 1 (1944); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886) (by implication)" [*Oyler* v. *Boles,* 368 U. S. 448, 456 (1962)].

POINT VII

The prosecutor did not unlawfully and vindictively multiply contempt counts by continued questioning of an unwilling witness [answering petitioners' Point 6, p. 19].

Petitioners contend that the assistant district attorney unlawfully built up contempt counts by continuing his inquiry when it became apparent that each petitioner intended to rely on his Fifth Amendment privilege. Throughout the investigation, however, it was never clear as to which questions the witnesses would assert their privilege.

For example, petitioner Crenovich testified freely for an extended period of time before refusing to reply to the prosecutor's question (630-52). When, eventually, he did indicate an unwillingness to respond, the prosecutor reminded him of the grant of immunity, whereupon he supplied the information requested (652-3). It was only much later that the witness adamantly refused to cooperate with the investigation, which resulted in one of the contempt citations (657). The record indicates that Crenovich continued his testimony until, at page 677, he again refused to respond, which formed the basis for the second contempt count. But even after this had occurred, Crenovich testified regarding certain matters. It can fairly be said, though, that his pattern of refusal or willingness to testify was arbitrary and could not be predicted with any degree of certainty, for sometimes he would comply with a direction by the foreman of the jury (668), and on other occasions he would refuse to do so (665, 676, 685). The other petitioners were similarly capricious in their choice of questions to which they would reply, except for petitioner Barnett, and his interrogation ceased after he refused to respond to the first two queries.

In any event, the question is academic, as petitioners received concurrent sentences on the multiple counts.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1967